United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2291

To be argued by
THOMAS E. ENGEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2291

UNITED STATES ex rel. DAVID BLOOMFIELD,
Petitioner-Appellant,

—v.—

LOUIS GENGLER, Warden, Federal House of Detention, New York, New York and THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondents-Appellees.

JOHN BENNETT ETTINGER,
Petitioner-Appellant,

—v.—

THOMAS E. FERRANDINA, United States Marshal,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR RESPONDENTS-APPELLEES LOUIS GENGLER and THOMAS FERRANDINA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR RESPONDENTS-APPELLEES LOUIS GENGLER and THOMAS FERRANDINA

Preliminary Statement

David Bloomfield and John Bennett Ettinger appeal from orders entered on September 24, 1974 in the United States District Court for the Southern District of New York by the Honorable William C. Conner, United States District Judge, denying their petitions for a writ of habeas

corpus and adopting the opinion dated August 21, 1974 of Gerard L. Goettel, United States Magistrate, which ordered the extradition of both appellants to the Dominion of Canada.

The Dominion of Canada ("Canada") commenced the extradition proceedings below on January 23, 1974 by filing with the Consul General of the United States of America in Ottawa, Canada certified copies of the judgments of the conviction of appellants entered on January 30, 1973 by the Supreme Court of New Brunswick, Appeal Division, in Fredericton, New Brunswick, together with various affidavits and materials identifying appellants as the persons sought.*

Bloomfield and Ettinger were arrested on April 8 and 9, 1974, respectively, under a warrant ordered by the Honorable Constance Baker Motley, United States District Judge, upon a complaint filed by an Assistant United States Attorney on behalf of Canada, pursuant to Title 18, United States Code, Section 3184. Appellants were subsequently released on $25,000 bail pending an extradition hearing.

The extradition hearing was held on July 11, 1974. In an opinion dated August 21, 1974 Magistrate Goettel concluded that there were "no valid grounds for refusing the petition for extradition" (App. A. at 32).**

On August 30, 1974 appellants filed petitions for a writ of habeas corpus. Following the submission of memoranda

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* No claim was made below, before either the Magistrate or the District Court, that appellants were not the persons identified in the extradition papers, which were introduced by the Government before the Magistrate without objection.

** References preceded by the letters "App. A." are to Appellants' Joint Appendix. References following the letters "Br." are appellant's joint brief. References preceded by the letters "G.A." are to the Government's Appendix.

of law and oral argument, Judge Conner adopted the decision of Magistrate Goettel and denied the application for a writ.

Applications for bail pending appeal were denied both by Judge Conner and on October 1, 1974 by this Court. Appellants are now in the custody of the United States Marshal.

Statement of Facts

1. The Proceedings in Canada

On May 3, 1972 Bloomfield and Ettinger, both United States citizens, and one Wilfred Julien Cormier, also a United States citizen, were arrested by Canadian authorities in New Brunswick, Canada for their participation in a scheme involving the importation into Canada of a large quantity of hashish.

Bloomfield, Ettinger, and Cormier were charged in a three-count indictment alleging three separate conspiracies, one to export hashish from Canada, a second to import hashish into Canada, and a third to traffic in hashish in Canada. All three were tried before Judge Reginald D. Kierstead in the County Court Judges Criminal Court for the County of St. John (App. A. 49). At the close of the evidence on July 25, 1972, the trial judge found that the evidence revealed the existence of only one conspiracy which had three objects: to export, import, and traffic in hashish. The trial judge, having found a single conspiracy, then dismissed the indictment as legally deficient (G.A. 5a).*

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* The opinion of the Supreme Court of New Brunswick, Appeal Division, in *The Queen* v. *Bloomfield, et al.*, dated January 30, 1973 was relied on by Magistrate Goettel in his opinion as the basis for his findings with respect to the facts of the offense committed by appellants. The opinion is reproduced in full in the Government's Appendix.

The appellants were released by the Canadian authorities on July 31, 1972, but before they returned to the United States, they were served with a copy of the Notice of Appeal filed by the Crown (App. A. 65).

The Crown appealed, to the Supreme Court of New Brunswick, Appeal Division, alleging error in the trial court's dismissal of the indictment. On January 30, 1973, the Supreme Court reversed the judgment of acquittal, holding that the trial court should not have dismissed the indictment and should have convicted appellant on one count of the indictment (G.A. 8a). The Supreme Court entered a verdict of guilty on the count charging conspiracy to import hashish into Canada, for which offense the Court found "direct evidence" (G.A. 10a), and imposed a minimum mandatory sentence of seven years imprisonment (G.A. 17a).

2. The Evidence at the Trial in Canada

The evidence presented against Bloomfield and Ettinger at their trial in Canada is summarized in the opinion of the Supreme Court of New Brunswick as follows:

> In the case before us there is in addition to evidence of association, conduct of the two accused, Bloomfield and Ettinger, directly related to the actions of Cormier in clearing through customs the crates in which the hashish was hidden, and in taking delivery thereof at the C.N. freight shed.
>
> Bloomfield registered himself and Ettinger at the Colonial Inn in Saint John at 9:30 a.m., May 1st, 1972 and occupied room #108. Cormier was seen leaving room #108 at 10:30 a.m. that morning. He returned about 12 noon and entered room #108 unlocking the door with a key. During the morning Cormier rented a half-ton truck. On May 2nd at 10 a.m. Bloomfield and Ettinger checked out of the

Colonial Inn at the same time as Cormier went to the C.N. freight shed and endeavoured to obtain delivery of the two crates containing the hashish. There he was informed he would have to get customs clearance and would have to go to the Customs Office on Prince William Street. Cormier attended at the Customs Office at 2:15 that afternoon and was told they would have to inspect and value the tapestries being imported and to return next morning, May 3rd.

Cormier telephoned the truck rental office to get permission to keep the vehicle two more days, but was refused. He returned the vehicle.

At 3:30 p.m. Bloomfield registered for himself and one other at the Fairport Motel in West Saint John. Bloomfield, Ettinger and Cormier had supper together on May 2nd and breakfast together on May 3rd at 9 a.m. One half hour later the Toyota Jeep with blue trailer driven by Bloomfield was seen being driven from the Fairport Motel into Saint John. At 10 a.m. Cormier registered at the Admiral Beatty Hotel from where he proceeded by taxi to the office of Budget Car Rentals where he rented a two-door Custom Ford, License #71473. At 10.40 a.m. the Toyota Jeep and trailer was driven north on Prince William Street in Saint John and parked a short distance from and in sight of the Customs Office at 109 Prince William Street. At the same time Cormier, driving the Ford #71473, stopped on Prince William Street and entered the Customs Office where he paid the duty on the tapestries. At 10:55 a.m. the Toyota Jeep driven by Bloomfield and in which Ettinger was a passenger left Prince William Street then returned at 11:05 a.m. passing the Customs Office. Cormier left the Customs Office at 11:05 a.m. and drove out Station

Street past the freight shed at 11:15 a.m. At 11:09 a.m. the Toyota Jeep containing Bloomfield and Ettinger parked on a side hill by the Y.M.C.A. building, overlooking the freight shed and station on Station Street and were seen looking downhill in the direction of those buildings when Cormier in the Ford passed the freight shed at 11:15 a.m. Cormier drove onto the Harbour Bridge made a "U" turn, returned and parked by the Station at 11:20 a.m. He went into the Station, came out and backed the Ford into the freight shed where he loaded the two crates containing the tapestries and hashish. At the same time that Cormier left the freight shed in the Ford, Bloomfield and Ettinger drove away in the Jeep from their vantage point and parked a very short distance away at the corner of Hazen and Carleton Street, in a place also on the side hill from which point they could observe all traffic proceeding past the Station and freight shed and the traffic on the Harbour Bridge over which Cormier was then proceeding. The Jeep remained at this vantage point until 11:40 a.m. when it was driven out of Saint John past Simms Corner and proceeded north towards Fredericton. It was stopped at a road block near Oromocto about 50 miles north of Saint John. The driver Bloomfield and passenger Ettinger were arrested.

Cormier meanwhile was also driving out of Saint John past the same Simms Corner and thence north towards Fredericton. Whether he became suspicious that he was being tailed by police cars or for some undisclosed reason he turned around in Grand Bay, some miles north of Saint John, and re-entered the City, travelling at times at 80 m.p.h., most unusual conduct for a person who had every reason to avoid police attention. I would infer he became aware of one or more police cars following him and thought

he would have a better opportunity to avoid the police by leaving the open through highway and concealing his car in some out-of-the-way parking area in a more congested area of the City.

The conduct of Bloomfield and Ettinger in maintaining surveillance over Cormier and the Ford car when he was clearing customs and taking delivery of the hashish, obviously acting as a look-out to see if the police were watching Cormier or following him, results in the natural inference of a pre-existing plan and agreement directly related to the importing of the hashish into Canada. No evidence was adduced of any other explanation of their conduct which might reasonably be true.

On the arrest of Bloomfield and Ettinger a search of the Toyota Jeep was made and inter alia a road map was found of the Northeastern United States and New Brunswick with a pen and ink line showing a route from Saint John, N.B., crossing the Canadian-U.S.A. border at Forest City, then proceeding through the State of Maine to Bangor.

Evidence was adduced that customs officers were not on duty at this border crossing point at all times and that at night until 7 a.m. one would not be stopped for customs inspection.

Only one route was marked on the map. The question then arises as to whether it was a proposed route into New Brunswick or back to the United States or to be used both ways. After the pickup of the hashish, both cars proceeded along the marked route towards Fredericton in spite of the fact that the route from Saint John to St. Stephen, crossing the border at Calais, was a much shorter and quicker route to Bangor and New York State and Connecticut where the three accused lived.

There was ample evidence to prove the conspiracy charged (G.A. 11a-14a).

ARGUMENT

POINT I

The applicable treaty provisions command appellants' extradition.

Appellants appear to argue that if they had been acquitted in a New York State Court of the offense for which they were acquitted by the trial court in Canada, the Double Jeopardy Clauses of the New York State and Federal Constitutions would bar their "commitment for trial" (as used in Article X of the Webster-Ashburton Treaty) for the same offense in the New York Courts. From this, they conclude that the treaty forbids their return to Canada. This argument is, at best, silly.

The purpose of this extradition proceeding is to return appellants to Canada to begin serving their sentences, having been duly convicted under Canadian law. Article VII of the 1889 Convention specifically authorizes the extradition of "persons convicted of the crimes . . . whose sentence shall not have been executed." 26 Stat. 1508 at 1510 (1889). Since appellants have been duly convicted of an extraditable offense by the Supreme Court of New Brunswick and have not served their sentences, Article VII of the 1889 Convention commands their return to Canada.

There is simply no basis for appellant's argument that Article X of the treaty confers upon them the protection of the Double Jeopardy Clauses of the New York and Federal Constitutions.

The treaty provides, in pertinent part, that the United States will surrender fugitives accused of enumerated crimes

> "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed . . ." 8 Stat. 572 at 576 (1842).

The language of the treaty sets forth a requirement, in effect, that there be probable cause to believe that the crime was committed by the fugitive and that the standard of probable cause be that of the jurisdiction in which he is apprehended. The treaty provision is concerned with sufficient "evidence of criminality" to justify a trial of the case, not with legal defenses to prosecution which might be raised at, or before, trial.

POINT II

Appellants' extradition would not offend the due process clause of the Fifth Amendment.

Appellants' claim that because the Canadian Appellate Court found them guilty and sentenced them *in absentia*, their extradition would violate the Due Process Clause of the Fifth Amendment. The argument is without merit.

Both appellants were present during their trial in Canada. Both were represented by counsel at the trial. After the lower court dismissed the indictment at the end of the trial, they were personally notified that the prosecution had filed an appeal. Nonetheless, they chose to leave Canada and permit their attorneys to handle the appeal in their absence (App. A. 64-65).

It is clear that extradition of a person convicted *in absentia* in a foreign country does not violate due process. *Gallina* v. *Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*,

364 U.S. 851 (1960). Here, appellants were not tried *in absentia*. Instead of awaiting the final outcome of the criminal proceeding against them, they voluntarily absented themselves from the jurisdiction knowing that an appeal had been taken. Having been represented by counsel, appellants are chargeable with knowledge that the appeal might result in a guilty verdict and sentence by the Canadian Appellate Court. Having waived their right to be present, they may not now complain that extradition to commence serving their sentences would violate the Fifth Amendment.*

Further, there is no merit to the suggestion that the appellate court's guilty verdict placed appellants in jeopardy twice for the same offense, since no final judgment of acquittal had been entered and since they were not subjected to the harassment of successive prosecutions. *United States* v. *Baker*, 419 F.2d 83, 89 (2d Cir. 1969), *cert. denied*, as *DiNorscio* v. *United States*, 397 U.S. 971 (1970).

In any event, the law is settled that the absence of constitutional or other rights in the extraditing nation's judicial system comparable to those guaranteed by the Federal Constitution in no way forbids extradition. *Neely* v. *Henkel*, 180 U.S. 109, 122-23 (1900); *Holmes* v. *Laird*, 459 F.2d 1211, 1218-19 n. 57 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); *Gallina* v. *Fraser*, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

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* Even under our own law, a defendant in a criminal case, may waive his right to be present at his trial, *United States* v. *Tortora*, 464 F.2d 1202, 1208-09 (2d Cir.), *cert. denied*, as *Santoro* v. *United States*, 409 U.S. 1063 (1972) and at the time of imposition of sentence. *United States* v. *Boykin*, 222 F. Supp. 398 (D. Md. 1963).

POINT III

The evidence was sufficient to warrant extradition.

For the first time on this appeal, appellants claim that the evidence was insufficient to warrant extradition. The argument is frivolous.

To support an order of extradition, there must be "competent legal evidence which would justify apprehension and commitment for trial." *Collins* v. *Loisel*, 259 U.S. 309, 315 (1922); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 900 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *see also Benson* v. *MacMahon*, 127 U.S. 457, 463 (1888).

An order of a Magistrate granting extradition is reviewable only by a writ of habeas corpus. The scope of review of the facts found by the District Judge in denying the writ is exceptionally narrow: the test is finding "whether there was any [competent] evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Shapiro*, *supra*, 478 F.2d at 901; *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *see also Charlton* v. *Kelly*, 229 U.S. 447, 456 (1913), *Gallina* v. *Fraser*, 177 *F. Supp.* 856, 857 (D. Conn. 1959), *aff'd* 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 555 (5th Cir. 1962), *vacated as moot*, 375 U.S. 48 (1963).

The evidence presented to the Magistrate constituted overwhelming proof of Bloomfield's and Ettinger's participation with Cormier in the conspiracy to import hashish. Appellants' surveillance of, and constant association with, Cormier on the day of the crime, and the day preceding it, in addition to the circumstantial evidence of the map showing an inked-out route to a customs station at the American border which would be unattended, constitute

far more than the minimum evidence required to sustain a magistrate's finding, and indeed, would have been sufficient to justify conviction if the case had been tried in a federal district court (see *supra*, pp. 4-7).

CONCLUSION

The orders denying the petitions for a writ of habeas corpus and approving the orders of extradition should be affirmed.

Respectfully submitted,

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THOMAS E. ENGEL,
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Of Counsel.

APPENDIX

APPENDIX

Statute and Treaty Provisions Involved

Title 18, United States Code, Section 3184:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Treaty Between the United States and Great Britain (Webster-Ashburton Treaty), 8 Stat 572 (1842):

ARTICLE X.

> It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them . . . deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed . . . 8 Stat. 572 at 576 (1842).

Extradition Convention Between the United States and Great Britain, 26 Stat. 1508 (1889):

ARTICLE VII.

> The provisions of the said Tenth Article [of the Webster-Ashburton Treaty] and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.
>
> In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers. 26 Stat. 1508 at 1510 (1889).

Convention Between the United States and Great Britain in Respect of Canada for Extradition of Offenses Against Narcotic Laws 44 Stat. 2100 (1925):

ARTICLE I.

The following crimes are, subject to the provision contained in Article II, hereof, added to the list of crimes . . . in the 1st Article of the said Convention of the 12th July, 1889 . . . that is to say:

17. Crimes and offences against the laws for the suppression of the traffic in narcotics.

ARTICLE II.

The operation of the present Convention is confined to cases in which the offences mentioned in the United States or in the Dominion of Canada, the person charged with the offence is found in the Dominion of Canada or in the United States respectively. 44 Stat. 2100, 2101 (1925).

Judgment

IN THE

SUPREME COURT OF NEW BRUNSWICK

APPEAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant

—and—

DAVID ALLAN BLOOMFIELD, WILFRED JULIEN CORMIER,
JOHN BENNETT ETTINGER,

Respondents

We Concur:

/s/

.....

C.J.N.B.

/s/

.....

J.A.

Coram: Hughes, C.J.N.B., Limerick and
Bugold, JJ.A.

LIMERICK, J.A.

Counsel for the Crown preferred an indictment against the three respondents, David Allan Bloomfield, Wilfred Julien Cormier and John Bennett Ettinger charging them jointly, in three counts; viz:

1. a conspiracy to export from Canada, hashish;
2. a conspiracy to import into Canada, hashish;
3. a conspiracy to traffic in hashish.

The evidence disclosed and the trial judge found there was only one conspiracy. He further found that conspiracy was to import, traffic in and export hashish and that each of the defendants conspired with each of the others to commit all three offences. He held ". . . There is but one conspiracy agreement disclosed by the evidence. . . . it is not open to the Court to select one of the charges under which the accused persons would be properly convicted. In my view the indictment is bad. I dismiss all the charges against the three accused. . . ."

The Crown now appeals, alleging error on the part of the judge on a question of law in that, having found the accused conspired to commit one or more indictable offences, he should not have acquitted the accused or found the indictment bad in law.

The facts of this case must be distinguished from cases where one conspiracy to commit several indictable offences is charged and the evidence establishes more than one conspiracy to commit individual offences. Such an indictment is bad because of duplicity or multiplicity. Where more than one offence is charged in an information or count in an indictment the information or count must be quashed. See section 510(1) of the Criminal Code, but it does not follow that an indictment charging a single offence in more than one way is bad.

The law is well settled that the substance of the offence of conspiring to commit an indictable offence is the agreement and not the commission of the indictable offence which is the object of the agreement and that if two or more persons enter into one agreement to commit two or more indictable offences there is only one conspiracy. See *Rose* v. *The King* (1946) 88 C.C.C. 114 at p. 121; *R.* v. *Graham* (1954) 108 C.C.C. 153 at p. 156.

It would appear the trial judge's reasoning followed that in *R.* v. *Mills*, an unreported decision of the Court of Criminal Appeals in England, referred to by *Cartwright J. in Cox and Paton* v. *The Queen* (1963) 40 C.R. 52 at p. 66. The Court of Criminal Appeals held a count of receiving a car knowing it to have been stolen and one of stealing two license plates from the car after receiving it were mutually destructive and allowed the appeal and set aside convictions on both counts. Cartwright J., at page 67 delivering the judgment of the Supreme Court of Canada said, referring, inter alia, to the Mills Case:

> "In my opinion, these cases rightly decide that the convictions of an accused (i) of stealing an article and (ii) of receiving the same article knowing it to have been stolen cannot both stand. But insofar as they hold that an Appellate Court has no power to uphold either conviction they appear to be at variance with the judgments of the Court of Appeal for Manitoba and of this Court in *Kelly* v. *The King*, 54 S.C.R. 220, [1917] 1 W.W.R. 463, 27 C.C.C. 282, 34 D.L.R. 311. In that case the jury rendered a verdict of guilty on count 1, theft of money belonging to The King, counts 2, unlawfully receiving money belonging to The King knowing the same to have been stolen and, count 4, obtaining money by false pretenses from His Majesty. The convictions on these three counts were upheld by a majority judgment of the Court of Appeal.
>
> It appears from p. 228 of the report in this Court that counsel for the accused argued that the accused could not be guilty of all three of these offences that he could not, indeed, be guilty of any two of them and that consequently the whole conviction was bad. This Court was unanimous in dismissing the appeal."

It is clear that the accused in the case before us should not be found guilty on more than one count in the indictment nor sentenced for more than one offence as there was only one conspiracy; the importing, trafficking and exporting referred to in the counts being only the objects of the conspiracy not the subject matter of the offence. Indeed if the importing, trafficking and, or, exporting were carried out in furtherance of the conspiracy, the accused could be tried and convicted of those offences in addition to the offence of the conspiracy to commit them. A conviction of conspiracy could also be entered even though the evidence disclosed the indictable offence or offences planned to be committed were not committed.

The Supreme Court of Canada also found in Cox v. Paton id. at p. 69:

> "... The reason that the conviction on counts 1 (conspiracy to steal) and 3 (conspiracy to defraud) cannot both be supported is not that they are "mutually destructive", as was said of the counts in Regina v. Mills, supra, but rather that if both were allowed to stand the accused would in reality be convicted twice of the same offence. It is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence. In my view, the Court of Appeal has power under Part XVIII of the Criminal Code, particularly s. 592(1)(b)(i) and s. 592(3) to decide that the conviction on count 1 should be quashed and that on count 3 affirmed."

The only essential difference between the Cox and Paton case and that now before us is that in the former the trial court convicted of both offences while in the latter it found all accused had committed all offences, but it convicted the accused of none. The inclusion of three

counts for the same offence does not, on the authority of Cox & Paton, render the whole indictment bad and on the appeal Crown counsel elected if the evidence was sufficient to warrant the conviction of the accused on more than one count including conspiracy to import, he would rely on that count.

The trial judge erred in law in finding the indictment bad and in failing to convict on one count of the indictment.

Counsel for the respondents contends that even if the trial judge erred in so finding that the appeal by the Crown should not be allowed as (1) the trial judge improperly admitted two confessions made by Cormier and Ettinger and that without these confessions there was no evidence or insufficient evidence on which to convict those two accused of conspiracy and (2) there was no evidence in any event on which to convict Bloomfield even if these confessions were properly admitted.

The Crown called all of the numerous police officers whom Cormier and Ettinger met or saw from the time of their arrest until after the written statements received in evidence, were signed by the two accused respectively. The accused were properly and adequately warned. It is only in respect of the evidence of Corporal Potts, the police officer who actually took the statements of Cormier and Ettinger, that any question as to the voluntary character of the statements arises.

In *R.* v. *Albrecht* (1966-7) 49 C.R. 314 this Court fully set out the law applicable to determine the voluntary character of statements made by an accused after arrest. It further set out the burden on the Crown and how that burden could be discharged. At page 325 the following appears:

> "The Crown must prove the statement voluntary, i.e., that no inducement was held out. The only way

> available to the Crown to prove such a negative proposition is to produce evidence of everything that was said to or in the presence of the accused and of all circumstances relevant to the making of the statement. . . ."

In this case the Crown did not follow that suggested procedure, possibly because Corporal Potts had said so much to the two accused to allay their fears and to persuade them to give a statement that he was unable to remember all he had said.

Prior to obtaining the statement from Ettinger, Corporal Potts held a 12 to 15 minute conversation with him during which he read the sections of the Narcotic Control Act relating to importing, trafficking and exporting hashish and explained the sentences for such offences to him. Ettinger said very few words. No evidence was led by the Crown as to what else, if anything, was said by Potts to Ettinger. If the matter rested there the trial judge should have excluded the statement as the Crown could not show the statement voluntary without disclosing all that was said on that occasion. The witness would have had to testify, 1. as to all other conversation on his part and 2. that nothing beyond what he had testified to had been said by him.

The facts are even more indicative of the statement not being voluntary for on cross-examination the officer admitted making many statements and that he might have made statements of which he had not testified on direct examination. Potts testified he had told the accused what Potts thought Ettinger could be charged with, stating he did not definitely know what the charges would be; this in spite of the fact that Ettinger had been arrested presumably on a specific charge.

Potts discussed with Ettinger, possible sentences, told him he was in serious trouble and his cooperation in telling of his involvement would be helpful. Potts thereby inferred to the accused that what charge would be laid and what the sentences might be depended on his (Ettinger's) co-operation and that confession would be helpful *to Ettinger*. Potts admitted on cross-examination that Ettinger might have drawn the implication that a confession would be favourable to him (Ettinger).

Even after admitting all this additional conversation on cross-examination Potts failed to testify that he had said nothing additional thereto to Ettinger.

The Crown not only failed to disclose the entire conversation by Potts with Ettinger but those portions adduced in evidence disclose the statement was probably induced by fear or hope of favour and is inadmissible.

The evidence as to the admission of the statement signed by Cormier is similar in nature and effect. Corporal Potts was alone with Cormier from 6:30 till about 6:55 or 7 p.m. and apart from stating he had warned Cormier, read over the relevant sections of the Narcotic Control Act and explained penalties and that he might be charged with importing or trafficking, disclosed nothing else of what was said. The implication to the accused is obvious, particularly in view of the Corporal's evidence: "I believe I indicated to him it may help in deciding what charges would be laid".

As the penalty for importing carries a minimum sentence of seven years imprisonment and as there is no minimum for trafficking, it is probable the accused was led to hope only the charge of trafficking might still be laid even though there was direct evidence of importing; an inducement by hope of favour, clear and specific enough to exclude any confession subsequently made.

The Crown also failed to prove that nothing further to what the defence elicited in cross-examination was said by Corporal Potts to Cormier and thereby failed to prove that confession voluntary.

Counsel further contended the evidence was insufficient to convict any of the the accused of conspiracy, alleging all that was disclosed by the evidence was an association by each of the accused with the other in that they met, knew one another and ate a number of meals together, and relied on *R.* v. *Harris* 89 C.C.C. 231 wherein at page 236 is stated:

> "There is, however, not a particle of evidence that the appellant was in any way concerned on any of these visits, in any of the affairs of the conspiracy, or that, on any of these occasions or at any other time, he did any act whatsoever in relation to the matters with which he is charged."

In the case before us there is in addition to evidence of association, conduct of the two accused, Bloomfield and Ettinger, directly related to the actions of Cormier in clearing through customs the crates in which the hashish was hidden, and in taking delivery thereof at the C.N. freight shed.

Bloomfield registered himself and Ettinger at the Colonial Inn in Saint John at 9:30 a.m., May 1st, 1972 and occupied room #108. Cormier was seen leaving room #108 at 10:30 a.m. that morning. He returned about 12 noon and entered room #108 unlocking the door with a key. During the morning Cormier rented a half-ton truck. On May 2nd at 10 a.m. Bloomfield and Ettinger checked out of the Colonial Inn at the same time as Cormier went to the C.N. freight shed and endeavoured to obtain delivery of the two crates containing the hashish. There he was informed he would have to get customs clearance and would have to go to the Customs Office on Prince William Street.

Cormier attended at the Customs Office at 2:15 that afternoon and was told they would have to inspect and value the tapestries being imported and to return next morning, May 3rd.

Cormier telephoned the truck rental office to get permission to keep the vehicle two more days, but was refused. He returned the vehicle.

At 3:30 p.m. Bloomfield registered for himself and one other at the Fairport Motel in West Saint John. Bloomfield, Ettinger and Cormier had supper together on May 2nd and breakfast together on May 3rd at 9 a.m. One half hour later the Toyota Jeep with blue trailer driven by Bloomfield was seen being driven from the Fairport Motel into Saint John. At 10 a.m. Cormier registered at the Admiral Beatty Hotel from where he proceeded by taxi to the office of Budget Car Rentals where he rented a two-door Custom Ford, License #71473. At 10:40 a.m. the Toyota Jeep and trailer was driven north on Prince William Street in Saint John and parked a short distance from and in sight of the Customs Office at 109 Prince William Street. At the same time Cormier, driving the Ford #71473, stopped on Prince William Street and entered the Customs Office where he paid the duty on the tapestries. At 10:55 a.m. the Toyota Jeep driven by Bloomfield and in which Ettinger was a passenger left Prince William Street then returned at 11:05 a.m. passing the Customs Office. Cormier left the Customs Office at 11:05 a.m. and drove out Station Street past the freight shed at 11:15 a.m. At 11:09 a.m. the Toyota Jeep containing Bloomfield and Ettinger parked on a side hill by the Y.M.C.A. building, overlooking the freight shed and station on Station Street and were seen looking downhill in the direction of those buildings when Cormier in the Ford passed the freight shed at 11:15 a.m. Cormier drove onto the Harbour Bridge made a "U" turn, returned and

parked by the Station at 11:20 a.m. He went into the Station, came out and backed the Ford into the freight shed where he loaded the two crates containing the tapestries and hashish. At about 11:30 a.m. Cormier drove away from the freight shed with the crates onto the Harbour Bridge ramp and across the bridge. At the same time that Cormier left the freight shed in the Ford, Bloomfield and Ettinger drove away in the Jeep from their vantage point and parked a very short distance away at the corner of Hazen and Carleton Street, in a place also on the side hill from which point they could observe all traffic proceeding past the Station and freight shed and the traffic on the Harbour Bridge over which Cormier was then proceeding. The Jeep remained at this vantage point until 11:40 a.m. when it was driven out of Saint John past Simms Corner and proceeded north towards Fredericton. It was stopped at a road block near Oromocto about 50 miles north of Saint John. The driver Bloomfield and passenger Ettinger were arrested.

Cormier meanwhile was also driving out of Saint John past the same Simms Corner and thence north towards Fredericton. Whether he became suspicious that he was being tailed by police cars or for some undisclosed reason he turned around in Grand Bay, some miles north of Saint John, and re-entered the City, travelling at times at 80 m.p.h., most unusual conduct for a person who had every reason to avoid police attention. I would infer he became aware of one or more police cars following him and thought he would have a better opportunity to avoid the police by leaving the open through highway and concealing his car in some out-of-the-way parking area in a more congested area of the City.

The conduct of Bloomfield and Ettinger in maintaining surveillance over Cormier and the Ford car when he was clearing customs and taking delivery of the hashish, obviously acting as a look-out to see if the police were watch-

ing Cormier or following him, results in the natural inference of a pre-existing plan and agreement directly related to the importing of the hashish into Canada. No evidence was adduced of any other explanation of their conduct which might reasonably be true.

On the arrest of Bloomfield and Ettinger a search of the Toyota Jeep was made and inter alia a road map was found of the Northeastern United States and New Brunswick with a pen and ink line showing a route from Saint John, N.B., crossing the Canadian-U.S.A. border at Forest City, then proceeding through the State of Maine to Bangor.

Evidence was adduced that customs officers were not on duty at this border crossing point at all times and that at night until 7 a.m. one would not be stopped for customs inspection.

Only one route was marked on the map. The question then arises as to whether it was a proposed route into New Brunswick or back to the United States or to be used both ways. After the pickup of the hashish, both cars proceeded along the marked route towards Fredericton in spite of the fact that the route from Saint John to St. Stephen, crossing the border at Calais, was a much shorter and quicker route to Bangor and New York State and Connecticut where the three accused lived.

There was ample evidence to prove the conspiracy charged. The trial judge erred in admitting the confessions but no miscarriage of justice arises therefrom as there was ample evidence of guilt, disregarding those confessions.

Counsel for the Crown offered in evidence a number of documents which were objected to by the defence on the ground that seven days notice as required by section 30 of the Canada Evidence Act had not been given. These docu-

ments included, inter alia, a registration card produced by the registration clerk of the motel, filled in and signed by the accused Bloomfield and a receipted customs invoice found in the possession of the accused Cormier. The documents were ruled inadmissible.

The trial judge erred in not admitting those documents. Section 30 of the Canada Evidence Act is enabling legislation not restrictive. Subsection (11) of section 30 clearly so states:

> 30.(11) The provisions of this section shall be deemed to be in addition to and not in derogation of
>
> (a) any other provision of this or any other Act of the Parliament of Canada respecting the admissibility in evidence of any record or the proof of any matter, or
>
> (b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

This section when passed enabled certain matters to be proven by the production of records kept in the ordinary course of business or by sworn copies thereof which previously, could only be established by viva voce evidence. Seven days notice to the opposite party is required by the section before its provisions may be utilized. This section is not intended to apply and does not apply where a document or record tendered in evidence is admissible under any other rule of evidence or statutory provision. Any document made out by a party to a civil or criminal proceeding and signed by him is, subject to certain exceptions, if relevant, admissible in evidence against him and was so admissible before the enactment of said section 30; so also is a document found in the possession of a party, if relevant.

The contention of counsel for the defence that statements signed by the accused and that a map found in the possession of the accused were records which could not be admitted in evidence without a notice as required by section 30(7) is without merit. Subsection (7) specifically refers to records to be "received in evidence under this section". Those documents were admissible under other rules of evidence than section 30 and indeed were not admissible in any event under that section by virtue of subsection (1) thereof:

> 30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

The section applies when oral evidence of a matter would be admissible and, in such circumstances, permits records or documents to be admitted in lieu thereof. Where a statement is made in writing and is signed by an accused the best evidence rule requires the statement itself must be placed in evidence and oral evidence of its contents cannot be given. Section 30 cannot therefore apply. The reasoning applies to a marked map found in the possession of the accused and to a registration card signed by an accused.

In the case of a signed statement of an accused person, the section could apply to facilitate proof in the event of the loss or destruction of the statement before trial if typewritten copies of the statement had been made in the usual course of business and kept in records of the police department. In such case, on proof of loss or destruction, oral evidence of the contents of the statement would have been admissible and section 30 would be applicable.

The appeal is allowed.

In accord with the provisions of section 613(4)(b)(i) of the Criminal Code I would enter a verdict of guilty against the three accused, David Allen Bloomfield, Wilfred Julien Cormier and John Bennett Ettinger for that on or about the 3rd day of May A.D. 1972 at the City of Saint John in the County of Saint John in the Province of New Brunswick, they did conspire together to commit the indictable offence of unlawfully importing into Canada a Narcotic, to wit: Cannabis Resin (Hashish) contrary to Section 423(1)(d) of the Criminal Code.

As the other two counts in the indictment charge the same conspiracy, one and the same offence, but allege different objects of that conspiracy, they cannot be found guilty twice of the same offence and a verdict of not guilty will therefore be entered on those counts.

The three accused are each sentenced to seven years imprisonment in the penitentiary at Dorchester, New Brunswick.

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R. V. LIMERICK, J.A.

January 30, 1973

★ U. S. Government Printing Office 1974— 614—207—420—74

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Thomas E. Engel being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of October, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Siegel & Graber
401 Broadway
New York, N.Y. 10013

William Es'litt, Esq.
122 E. 42nd St.
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas E. Engel

THOMAS E. ENGEL

Sworn to before me this

18th day of October, 1974

Lawrence S. Feld

LAWRENCE S. FELD
Notary Public, State of New York
No. 31-0358352
Qualified in New York County
Commission Expires March 30, 1976